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totally different decision. For instance, a mortgagee who as agent for the mortgagor participated in the defense of an action of ejectment, by employing and paying counsel to conduct the defense, was held not bound by the judgment in a subsequent suit, *Williams* v. *Cooper,* 124 Cal. 666. So also, where it did not appear that the party was able to control the cause or to appeal therefrom, *Ottensoser* v. *Scott,* 47 Fla. 276, 66 L. R. A. 346, 110 Am. St. Rep. 137; *Central Baptist Church* v. *Manchester,* 17 R. I. 492, 33 Am. St. Rep. 893. Nor is one bound merely because he obtains a hearing of his counsel on the argument of the question in which he is interested, *Goodnow* v. *Stryker,* 62 Ia. 221; *Walters* v. *Chamberlin,* 65 Mich. 333; *Acker* v. *Ledyard,* 8 Barb. 514; *Wilke* v. *Howe, 27* Kan. 518. Nor is a city officer concluded by a judgment in a suit by a taxpayer to restrain payment of his salary, to which he was not a party, though he employed counsel to defend such suit, *State ex rel. Kane* v. *Johnson,* 123 Mo. 43. On the general question, see *Lane* v. *Welds,* 99 Fed. 286; and also *Boyd* v. *Wallace,* 10 N. D. 78, each holding that the party's action must have been open and known to the opposite party. See also *Hardee* v. *Hall,* 12 Bush. 327; *Bennitt* v. *Mining Co.,* 119 Ill. 9.

Mr. BLACK lays down three conditions which must be fulfilled before we can have an estoppel in such cases. First, the person so intervening must not be a mere intermeddler, but must appear for some interest of his own. Second, "he must have defended the action avowedly and with notice to the opposite party; and thirdly, the interposition must have been complete, so that he was practically substituted for the defendant in the management and control of the case." BLACK, JUDGMENTS, § 540. However, it is doubtful, to say the least, whether all the cases on this point could be reconciled by applying these conditions, and the task is rendered the more difficult by the modern tendency, so often noted, of loosely stating all the facts of a given case, so that many times it does not appear at all whether the opposite party had notice of the third person's interposition; or who had the management and control of the case. For a resumé of the subject from a different viewpoint, see FREEMAN, JUDGMENTS, § 174 et seq. W. W. M.

THE ADMISSIBILITY OF PRIOR CONSISTENT STATEMENTS BY WITNESSES.—The recurring difficulty relative to the admission of prior statements, variously termed consistent, consonant, and corresponding, is again emphasized in a recent Pennsylvania adjudication, *Lyke* v. *Lehigh Valley R. Co.* (Penn. 1912) 84 Atl. 595. A brief review of the case discloses the problem involved in the offer of such evidence and makes apparent a strong willingness on the part of the Pennsylvania Court to adhere to its former rulings upon this question despite the fact that numerous authorities take an opposite view. The plaintiff in an action to recover damages for personal injuries testified in his own behalf that he was present and working on the car in question at the time of the accident. Witnesses for the defendant company contradicted this testimony; and in addition to the contradiction other witnesses were presented by the company, "who testified that the plaintiff had declared to them either specifically, or in effect, that he was not on the car at that time." Further upon cross-examination of the plaintiff counsel for the defendant strongly

intimated that the claim of the plaintiff had been deliberately fabricated. Plaintiff then called a witness in rebuttal who testified that plaintiff, immediately after the accident had stated that he had been injured upon the car. The reception of this testimony was urged as error. The Supreme Court, however, sustained the admission, remarking that, "testimony of this character is known as evidence of a consonant statement; and this may be defined as a prior declaration of a witness whose testimony has been attacked and whose credibility stands impeached, which, considering the impeachment, the Court will allow to be proved by the person to whom the declaration was made, in order to support the credibility of the witness, and which, but for the existence of such impeachment, would ordinarily be excluded as hearsay."

Questions involving the admissibility of prior consistent statements have for a considerable time troubled the courts. The admission of such statements is allowed in nearly all jurisdictions as a creditable answer to certain specified modes of impeachment, such as bias, interest or corruption, WIGMORE, EVIDENCE, § 1128; in other jurisdictions, chiefly Pennsylvania and North Carolina, the classes or character of impeachment warranting such statements in rebuttal are more extended, such as impeachment by evidence of former declarations inconsistent with the version presently offered on trial; while in at least one other jurisdiction (Michigan) the reception or rejection of such prior consistent statements is reposed in the sound discretion of the court.

In all courts, however, the rule is set forth, that before any evidence of prior consistent statements of the witness can be introduced, there must have been previous evidence amounting to a substantial impeachment of the witness thus sought to be sustained. Even in those courts which sanction the broadest introduction of such statements the witness cannot be fortified until after impeaching evidence has been urged and accepted. Justice CLIFFORD, in *United States* v. *Holmes,* 1 Cliff. 98, used the following language, "No principle in the law of evidence is better settled than the one enunciated in the rule, that testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it." And in *State* v. *Parish,* 79 N. C. 610, relied on in the principal case, and frequently cited in behalf of its doctrine, the necessity for impeachment is thus forcibly enunciated, "If he (the witness whose prior statements had been erroneously introduced) stood before the court unimpeached, it was unnecessary and mischievous to encumber the court and oppress the defendant with his garrulousness out of court and when not on oath." However in this connection see *Barkley* v. *Copeland,* 74 Cal. 1, 5 Am. St. Rep. 413.

As previously stated, uniformity does not exist on the particular question respecting the admissibility of former consistent statements of the witness to rebut the discrediting influence of evidence of declarations inconsistent with the version presently offered by the witness. However in the States acknowledging their admissibility they are not intended as a *confirmation of the evidence* of the witness. They have another purpose. They operate to

rehabilitate the *credibility of a witness* already infringed upon. *State* v. *Parish,* 79 N. C. 610. In another case arising in the same State, *Jones* v. *Jones,* 80 N. C. 246, the court said: "The admissibility of previous correspondent accounts of the same transaction to confirm the testimony of an assailed witness, delivered on the trial, rests upon the obvious principle that as conflicting statements impair, so uniform and consistent statements sustain and strengthen his credit before the jury. * * * Again, the accuracy of memory is supported by proof that at or near the time when the facts deposed to have transpired, and were fresh in the mind of the witness, he gave the same version of them that he testified to on the trial. Suppose they had been written down and not since seen by the witness, would not the production of the written memorandum greatly confirm one's confidence in the integrity of his testimony to the same facts before the jury? It must be observed, however, that this evidence is not received in proof of the facts themselves, but to sustain the credibility of the witness in what he swears to on the trial." The admissibility of prior consistent statements is firmly established in North Carolina, though there has evidently been no want of controversy upon the subject. *Johnson* v. *Patterson,* 2 Hawks 183; *March* v. *Harrel,* 1 Jones L. 329; *Bullinger* v. *Marshall,* 70 N. C. 520; *State* v. *Baker,* 114 N. C. 812. The same view was early adopted in Indiana, *Coffin* v. *Anderson,* 4 Blackf. 395, and as recently as *Hicks* v. *State,* 165 Ind. 440, the court asserted it to be "settled law" in that State. Likewise in Tennessee it has met with approval, *Graham* v. *McReynolds,* 90 Tenn. 673. And in Texas, *Texas & Pacific R. Co.* v. *Hall,* 17 Tex. Civ. App. 45; *Harville* v. *State,* 54 Tex. Cr. Rep. 426; *Schmick* v. *Noel,* 72 Tex. 1. In Maryland, a very liberal view was early announced in the case of *Cooke* v. *Curtis,* 6 H. & J. 93, where the court held that a mere contradiction on the part of the defendant of evidence put forth by a witness of the plaintiff amounted to such an impeachment of the witness' credibility as to let in evidence of his prior consistent statements. This ruling was followed in *Washington Fire Insurance Co.* v. *Davis,* 30 Md. 91, but in *Maitland* v. *Citizens National Bank of Baltimore,* 40 Md. 540, the following utterance is made, "It is a rule, however, not very generally recognized in the courts of England, or of other States of this country and it should not be extended, but applied strictly." *Gill* v. *Staylor,* 93 Md. 453, sustains the rule of *Cooke* v. *Curtis, supra,* as modified and interpreted, however, by intervening Maryland adjudications. See also *United States* v. *Neverson et al.,* 1 Mack. (D. C.) 152.

The majority of courts take an opposite view. A strong and pertinent case on this subject occurred recently in Illinois, *Chicago City R. Co.* v. *Mathieson,* 212 Ill. 292. One Kern was called as a witness for the Railway Company and testified that the car in question was about twenty-five or thirty feet from the wagon. Subsequently plaintiff introduced a paper in evidence, signed by Kern, wherein the distance was stated to have been about three or four feet. On redirect examination counsel for defendant offered the original deposition of Kern taken at the coroner's inquest shortly after the accident, and the statements of which substantially corresponded with his present testimony. The Supreme Court held the deposition to have been

properly refused admission. "If two statements are contradictory they cannot both be true, and the fact that they were made tends to show that the witness is unreliable, on account of an uncertain memory or want of truthfulness. It seems clear that such evidence could not be overcome or explained by proving that the witness at some other time made a statement consistent with his testimony. The witness is discredited by the fact that he has contradicted himself and related the transaction in different ways, and to admit evidence that at some time he had made a statement consistent with his testimony would only show that at different times he had been making different statements about the same matter. The only way to meet evidence of a contradictory statement is to prove that the witness did not make it."

The California court used language equally as prohibitive as the above, in *People* v. *Doyell,* 48 Cal. 85. "The witness cannot be confirmed by proof that he has given the same account before, for his mere declaration is not evidence. His having given a different account, although not upon oath, necessarily impeaches either his veracity or his memory; but his having asserted the same thing does not in general carry his credibility further than, nor so far as, his oath." The court admits that such evidence might be admissible in certain peculiar cases, among others to rebut an inference that the present testimony is recent fabrication. See also *Mason* v. *Vestal,* 88 Cal. 396.

The question is carefully analyzed in *Commonwealth* v. *Jenkins,* 10 Gray 485, and the conclusion reached that the value of such prior corresponding statements is "altogether too slight and remote" to warrant admission. In the late case of *Commonwealth* v. *Tucker,* 189 Mass. 457, the subject is again considered and after reviewing the above case, the court acknowledges an adherence to the rule there laid down, commenting that such evidence carries with it a strong tendency to impress the jury as substantive evidence of the truthfulness of the testimony thus supported.

Even in Pennsylvania there is no want of utterance adopting a view contrary to that enunciated in *Lyke* v. *Lehigh Valley R. Co., supra.* In fact Chief Justice GIBSON in an early case in that State, *Craig* v. *Craig,* 5 Rawle 91, put forth arguments so cogent against the admittance of prior consistent statements, that his reasoning and words are frequently referred to in decisions upholding that principle. But later decisions in Pennsylvania have not conformed to the rule announced in the *Craig* case.

For other decisions sustaining what may be designated the majority view, see *United States* v. *Holmes, supra; McKelton* v. *State,* 86 Ala. 594, overruling *Sonneborn* v. *Bernstein,* 49 Ala. 168; *McBride* v. *Georgia, etc. Co.,* 125 Ga. 515; *State* v. *Porter,* 74 Ia. 623; *Cincinnati Traction Co.* v. *Stephens, Admr.,* 75 Ohio St. 171; *Deckert* v. *Municipal Electric Light Co.,* 39 N. Y. App. Div. 490; *Robb* v. *Hackley,* 23 Wend. 49.

Justice COOLEY, in *Stewart* v. *People,* 23 Mich. 63, (CAMPBELL, C. J., dissenting), approved the admission, under the particular circumstances of that case, of evidence of prior consistent statements. The entire nature and scope of the controversy in this class of cases is laid bare by Justice COOLEY and his treatment of the question elicited the following comment of Professor

WIGMORE, in § 1126 of his work on EVIDENCE: "This argument seems irrefragable. It does not deny the correctness of the preceding argument, which points out that a consistent statement does not explain away a self-contradiction: but it shows that argument to rest upon an assumption that there has been a self-contradiction, and it reminds us that consistency of statement may serve to overthrow that assumption. This third view, (viz., that the reception or rejection of such statements should be placed in the sound discretion of the trial court), however, has rarely been noticed." Paucity of notice, however, cannot detract from the worth of the view. S. E. D.

EFFECT OF THE EXPIRATION OF A STREET RAILWAY COMPANY'S FRANCHISE.—One would naturally think that when a street railway company obtains from a city council the grant of a franchise in a city street for a prescribed period, the company would at the end of that period have no further right to use the street without another grant from the city council; but the stubborn fight made by the railway company in the recent case of *City of Detroit* v. *Detroit United Railway Co.*, 137 N. W. 645, causes one to wonder if there is not substantial ground for a different conclusion. In that case the street railway company's franchise in certain streets had expired, and the city sought to enjoin the railway company from operating its cars on those streets and to compel it to remove its property therefrom unless the company should pay certain charges fixed by resolution of council. The Michigan Supreme Court held that the contractual relations ended upon the expiration of the franchises, and all rights in the defendant company to occupy the city streets and maintain and operate a street railway thereon then terminated, and the company thereafter became a trespasser; that the city has the absolute right at any time to compel the company to vacate the street upon which the franchises have expired and require it to remove its property therefrom within a reasonable time, and if necessary for that purpose to enforce its rights by a writ of assistance; that the company would yet continue to own the rails and other operating appliances, and would have a reasonable time after notice in which to remove such property. A franchise granted by a municipality to a street railway company and accepted by it constitutes in law a contract mutually binding on both parties, and the rights created by the contract are terminated by the limitations stated in that contract. *Grand Rapids Bridge Co.* v. *Prange*, 35 Mich. 400, 24 Am. Rep. 585; *Union Street Ry. Co.* v. *Saginaw Circuit Judge*, 113 Mich. 694; *Scott* v. *Missouri*, 215 U. S. 336, 30 Sup. Ct. 110; *Detroit* v. *Railway Company*, 184 U. S. 382, 22 Sup. Ct. 410; *Augusta and Summerville R. Co.* v. *City Council of Augusta*, 100 Ga. 701; *City Ry. Co.* v. *Citizen's St. R. Co.*, 52 N. E. 157. The rights under such franchise depend upon the express terms of the grant, and such grants are to be strictly construed in favor of the municipality. *Traverse Company* v. *Traverse City*, 130 Mich. 22; DILLON, MUNIC. CORP., 5 Ed., 1233; *Cleveland Elec. Ry. Co.* v. *Cleveland*, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399; *Horner* v. *Eaton Rapids*, 122 Mich. 121; *State ex rel* v. *City of Thief River Falls*, 102 Minn. 425, 433; *Henry* v. *Railway Co.*, 140 Ia. 201; *Water Company* v. *Knoxville*, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353. In many States public officials have no power to grant an extension of a franchise by mere